

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 657 of 1987

For Approval and Signature:

HON'BLE MR.JUSTICE SHARAD D.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

SHASHIKANT PRANLAL JARIWALA

Versus

JIYAUDDIN ABDUL AZIZ SHAIKH & ANOTHER

Appearance:

1. Criminal Appeal No. 657 of 1987
Mr.Mrugen Purohit for MR PG DESAI for Petitioner No. 1
MR RR MARSHALL for Respondent No. 1
Mr.B.D.Desai learned A.P.P. for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 15/09/2003

ORAL JUDGEMENT

1. The present appeal is preferred against the

judgment and order of learned J.M.F.C.(Muni.) Surat dated 28.02.1986 passed in Muni.Case no. 485/84, acquitting the respondent no. 1.

2. The brief facts of the case are that the present respondent no. 1 constructed illegally in Rudarpura Ward no. 2 Note no. 2477 without the permission of the Corporation and against the plan no. B.S.R.802 dated 16.04.1982 and closed the open space and constructed R.C.C.Slab and changed the position of w.c. and bathroom and also constructed loft.

3. The respondent no. 1-accused denied the guilt in his statement under Sec. 313 of the Criminal Procedure Code and claimed to be tried.

4. The learned trial court recorded the depositions of ; (1) P.w.1 Shashikant Pramlal Jariwala exh. 11, (2) p.w. 2 Gurudatt Kikubhai Desai exh. 19, (3) p.w. 3 Dhirajlal Ishwarlal Darji exh. 32 and also relied on various documentary evidence produced by the parties.

5. After going through the evidence on record and after hearing the learned advocates for the parties, the learned trial court came to the conclusion that the guilt is not proved against the accused and therefore acquitted the accused. It is against this judgment and order, the Surat Municipal Corporation has filed this appeal.

6. Learned advocate Shri Mrugen Purohit for Mr.P.G.Desai learned advocate for the appellant submits that the learned Magistrate has not properly appreciated the evidence of three witnesses examined by the Corporation. The respondent no. 1-accused was served with the prohibitory order which was on the record of the case at exh. 24 and inspite of the prohibitory order, the respondent no. 1-accused has illegally made the construction without the sanction of the Corporation. The sanction given by Shri R.D.Desai which is on record of the case at exh. 12 has not been considered in right perspective by the leaned trial court Judge. Inspite of the injunction order served on the respondent no. 1, he has gone on constructing his property illegally. The trial court has not appreciated the report of the Inspector of Corporation that the respondent no. 1 is constructing illegally and thereby erred in appreciating the provisions of Sec.253,254,256 and 260(1) of the B.P.M.C.Act. The learned trial court Judge has also erred in holding that the notice in question is illegal and Town Development officer has no power to issue such notice and thereby erred in acquitting the respondent no.

1-accused which resulted into miscarriage of justice. The learned trial court Judge has also erred in coming to the conclusion that the complaint filed in the trial court is time-barred. In view of the aforesaid circumstances, learned advocate for the appellant submits that the judgment and order of the learned trial court deserves to be set aside by holding that there is continuous violation of the provisions of B.P.M.C.Act and therefore severe punishment should be ordered on respondent no. 1 by reversing the order of acquittal.

7. In support of his submissions, Mr.Purohit learned advocate for the appellant relied on the following authorities :

1. Ahmedabad Municipal Corporation V/s Vijay Owners' Association reported in 2000(3) G.L.R.2505.
2. John Hamilton Christian V/s Tapti Corporation & Ors. reported XXXIX (2) G.L.R. 1270.

8. Against the aforesaid submissions, Mr.R.R.Marshall learned advocate for the respondent no. 1-original accused has submitted that from the deposition of witnesses, it is crystal clear that the appellant had given complaint before certain persons and that complaint is not produced on record. Sec. 428 of the B.P.M.C.Act makes the position clear that such a complaint is to be filed within a period of six months from the date of knowledge. From the deposition on record, it is crystal clear that the complaint filed by the complainant in this case is not within a period of six months and accordingly the learned trial court Judge has rightly held that the complaint filed by the present petitioner is time-barred. It is further argued by the learned advocate for the respondent no. 1 that notice at exh. 23 is issued by a person who has no authority in the eye of law. Mr.R.D.Desai is Town Planner of Surat Municipal Corporation and in absence of Mr.R.D.Desai the charge is given to Mr.D.I.Darji. The post of City Development Officer is vacant and Mr.D.I.Darji has issued notice as incharge City Development Officer which is bad in law. Moreover, notice in question is issued under B.P.M.C.Act whereas the application for construction was given by the respondent no. 1-accused under the Town Planning Act. Therefore also, the notice issued under the B.P.M.C. Act is not proper.

9. In submissions of Mr.Marshall learned advocate for the respondent no. 1, looking to the powers under B.P.M.C.Act, the Commissioner of Surat Municipal Corporation has powers to take action against the present

respondent no. 1, however, he has not taken any steps under the said Act nor he has fully delegated powers under the said Act to any other officer working under him. The Commissioner can delegate the powers under Sec. 69 of the B.P.M.C.Act. If we peruse delegation of powers as produced at exh. 11 on record, he has delegated some powers to the Supervisor of City Development department subject to permission of City Development Officer. The complainant has failed to prove that any powers are delegated to the City Development officer for filing complaint. Therefore also, show cause notice at exh. 23, injunction order at exh. 24 and notice at exh. 25 are bad in law. Therefore the judgment and order passed by the learned trial court Judge requires to be confirmed.

10. According to the learned advocate for the respondent no. 1 for the changes made in the house such change of stair case, change in w.c.and bathroom and change in loft, no permission is required from the Commissioner of the Corporation. For this purpose, the corporation has also passed resolution no. 23 produced at exh. 28, which states that mere information of intention to make necessary changes is required to be given to the concerned authority. From the papers produced on record, it is crystal clear that the plans of construction are produced at exh. 20. Moreover, the alleged extra construction is of 29.26 sq.mtr. As per the resolution produced at exh. 35, 100% construction can be done under the Town Planning Act. From the papers produced on record, it is clear that the respondent no. 1 of the present case can construct 100% over his property and therefore also there is no violation as alleged by the complainant.

11. So far as the authority of Vijay Owners' Association (supra), in submission of Mr.Marshall learned advocate for respondent no. 1, the court has considered Sec. 260 of B.P.M.C.Act, Sec. 49 of the Gujarat Town Planning and Urban Development Act, Secs. 37 & 38 of the Specific Relief Act and Order 39 Rules 1 & 2 of the civil procedure Code. The court also considered the fact that this case was filed before the Auxiliary Chamber Judge, Ahmedabad in Civil Suit no. 4980 of 1994 on 08.07.1998. So far as the case of John Hamiltion Christian (supra) is concerned, the court was considering the breach of rules which amount to an economic offence. In the present case, the facts does not pertain to the violation of any economic offence. Therefore, the authority of Apex Court does not help the present appellant-corporation. In short the learned advocate for the respondent no. 1 has

fully supported the judgment and order passed by the learned trial court judge and requested this court not to interfere with the judgment and order and dismiss the appeal filed by the Corporation.

12. Mr.B.D.Desai learned A.P.P. for the respondent no. 2 has supported the arguments of Mr.Mrugen Purohit learned advocate for appellant.

13. I have perused the trial court's papers and authorities cited by the learned advocate for the appellant. So far as limitation point is concerned, Sec. 428 of the B.P.M.C.Act 1949 reads as under :

"428. Limitation of time within which complaints of offence punishable under this Act shall be entertained.

No Magistrate shall take cognizance of any offence punishable under this Act, or any rule, regulation or by-law, unless complaint of such offence is made before him-

(a) within six months next after the date of the commission of such offence;

or

(b) if such date is not known or the offence is a continuing one within six months next after the commission or discovery of such offence."

In light of the aforesaid section, if we peruse the deposition of P.W. 3 Dhirajlal Ishwarlal Darji exh. 32 it appears that Mr.Darji was working as Assistant City Development Officer of the Corporation's City Development Department. His work was to see that the constructions in the concerned ward are as per the plan passed by the Corporation or not and also inform the authority if any illegal construction is going on. The witness was shown the plan produced at exh. 20 of property of respondent no. 1 situated at Rudarpura Machhivad area in ward no. 2. The witness stated that it was a permission to construct in respect of the present respondent no. 1. It was signed by City Development Officer Mr.R.D.Desai and Supervisor Mr.J.K.Desai. The witness also admitted signature along with the plan produced at exh. 21. The Supervisor has produced report regarding illegal construction which is at exh. 22. As per the said report, the present respondent no. 1 had constructed illegal windows and ventilators and also constructed pipes. The witness identified the signature on exh. 22. The witness was also shown letter exh. 25 written to respondent no. 1 to remove the windows and ventilators where he identified his signature. According to the

witness, he went to the place of illegal construction on 22.3.83. When he went to the place, there was no work going on and there were no chances of meeting the respondent no. 1. The witness denied the statement that he has taken measurement, which he has not kept with the report.

14. In cross-examination of the witness, he has stated that he has not seen the complaint given by set of persons in respect of the property in question nor he had any chance of meeting such persons also. He further clarified that such complaint never came to him and that his higher officers has also not passed order on such complaint. He has no personal knowledge in filing such a complaint.

15. From the aforesaid deposition, it is crystal clear that except aforesaid witness, no other witness in clear terms stated regarding alleged information regarding illegal construction done by respondent no. 1. In light of the aforesaid discussion, if we look to the written note exh. 22, it appears that the incharge City Development Officer visited the side of illegal construction on 18.02.1983 and noted the illegal construction. Ultimately, on such a note at exh. 22 the higher authority has decided to issue injunction under Sec. 260(1)(a) of B.P.M.C.Act not to construct further. The carbon copy of such injunction issued to the present respondent no. 1 duly signed by him dated 01.03.1983 is placed on record at exh. 23. Exh. 24 is the injunction order duly signed by respondent no. 1. Exh. 25 is notice issued on respondent no. 1 to remove such illegal construction failing which the respondent no. 1 was warned that action will be taken against him on 19.02.1983. In light of the aforesaid letters/notices if we peruse the complainant's complaint exh. 1 which is dated 09.08.1983. Therefore, there is a reason to believe that the complaint is filed within six months from the date of knowledge and accordingly I come to the conclusion that the finding of the learned trial court that the complaint is time-barred is devoid of merits and requires to be set aside.

16. The next important question which has been raised by Mr.Marshall learned advocate for the respondent no. 1-original accused is to the effect that Mr.R.D.Desai was working as Town Planner with the Department. Moreover, at that time there was a vacant post of City Development Officer for which applications were called by the Commissioner-Surat Municipal Corporation by giving advertisement dated 20.04.1983. For this purpose,

learned advocate for the respondent no. 1 has relied on copy of advertisement produced at exh. 13. By referring to resolution passed by the Standing Committee, it was further contended by learned advocate for the respondent no. 1 that after taking interview of the candidates for the post of City Development Officer, two persons were appointed on that post ; (1) Shri Nareshchandra Pritamlal Malik and (2) Shri Jayesh Ravjibhai Patel. The copy of the said resolution is produced at exh. 14. The said resolution of the Standing Committee was passed by the General Meeting of the Corporation on 27.02.1984 which is produced at exh. 15. Thereafter, vide copy produced at exh. 16, at the General Meeting of the Corporation on 22.06.1984, has cancelled the resolution no. 365 passed on 27.02.1984 and further requested the Government to appoint on deputation basis. Under the circumstances, in submission of Mr.Marshall learned advocate for the respondent no. 1, there was no one working as City Development Officer nor there was a valid appointment of incharge City Development Officer and accordingly, the notice is required to be held bad in law and cannot be acted upon.

17. To this, Mr.Purohit learned advocate for the appellant has relied on papers produced at exh. 33, 34 and other papers which are referred earlier wherein person who has signed the said papers has signed them as incharge City Development Officer of Surat Municipal Corporation. The copy of resolution by Assistant Commissioner Surat Municipal Corporation dated 10.02.1983 whereby Mr.D.I.Darji working as Assistant Development Officer was asked to take the charge of City Development Officer over and above his liabilities in absence of Mr.R.D.Desai. Therefore, there is a reason to believe that Shri R.D.Desai was the Town Development officer and on his leave Mr.D.I.Darji was ordered to keep the charge of T.D.O. over and above his charge. If we peruse the order produced at exh. 12 (A), it is signed by Mr.R.D.Desai on 08.08.1983. The complainant Shashikant Pranlal Jariwala who was at the relevant time City Development Inspector in the Surat Corporation has stated at exh. 11 that vide Standing Committee resolution no. 1592 dated 23.03.1979 certain powers have been delegated to officers as shown in schedule produced at exh. 11(A) including powers of T.D.O. Though complainant Jariwala has admitted that he has no personal knowledge regarding the complaint filed by him, however, he produced all the papers before R.D.Desai T.D.O. on account of necessary permission to file complaint against the present respondent no. 1 and after verifying all the papers, Mr.R.D.Desai gave permission to file the complaint.

18. In view of the aforesaid circumstances, I am of the view that Mr.R.D.Desai was working as T.D.O. at the relevant time and by the Commissioner's powers for delegation, Mr.Darji was working as incharge T.D.O. who has sanctioned the papers. So far as authority of this court (Coram :B.C.Patel, J (as he then was) and P.B.Majmudar, J) in case of Vijay Owners' Association (supra) is concerned, while deciding notice of motion, this court held that the trial court erred in passing order of maintenance of status-quo. The High Court of Gujarat observed that the approach of the trial court granting injunction was deprecated.

In the case of John Hamiliton Christian (supra), the court was considering the breach of rules 21 & 28 of Octroi rules of Municipal Corporation as well as Section 398,428 of B.P.M.C.Act. So far as Sec.468 of B.P.M.C.Act is concerned, the court observed that where the court so thinks fit the cognizance can be taken even after the period of limitation has expired. Where the court has dismissed the complaint by holding that it cannot take cognizance on some grounds, that the dismissal does not amount to acquittal and revision application is maintainable.

19. It is true that the Division Bench of this court has held in aforesaid matter, however, I have to consider the principle as laid down in the said judgment. The court considered the Town Planning and Urban Development Act and also discussed the various provisions of B.P.M.C.Act. One of the arguments of respondent no. 1 was to the effect that Municipal Corporation has no right to issue notice under any provision of Town Planning and Urban Development Act. When the Municipal Corporation has already granted permission for construction under the provision of B.P.M.C.Act. It may be noted that in para 42,52 & 53 of the aforesaid judgment also refers the discussion regarding the point raised by learned advocate for the respondent no. 1. Therefore, I am of the opinion that the action taken by appellant-Municipal Corporation under either B.P.M.C.Act or Town Planning and Urban Development Act for unauthorized construction as discussed by the trial court judgment has no base and this court holds that the powers vested in Mr.Darji as incharge T.D.O. of Surat Municipal Corporation was proper and accordingly the discussion done by the trial court Judge on this point also deserves to be set aside.

20. So far as the resolution of construction work exh. 28 for which no permission is required by the Corporation is concerned, it may be noted that for this

purpose, before the commencement of the work, the person who wanted to carry the work has to inform the Municipal Commissioner of the intention to do so after obtaining written receipt from Commissioner. I do not find any such receipt produced on record by the respondent no. 1. What the respondent no. 1 has produced is map exh. 20. As per the said plan and commencement certification of construction, the respondent no. 1 was not permitted to construct any floor in the open chowk area. Herein the respondent no. 1 has done so along with construction of loft at 7 ft. change of stair case, change of pipes of w.c. and bathroom and also change the position of pipes. As the respondent no. 1 has constructed more than the plan passed by Municipal Corporation, the supervisor/TDO has filed complaint and accordingly, steps were taken against him. Therefore, the appellant-Corporation has done the right steps in issuing notice.

21. Coming back to the judgment of the trial court and as per the above discussion, I am of the opinion that the powers vested in the T.D.O is proper and accordingly the Supervisor T.D.O. has filed complaint before the trial court as per Sec. 253,254,256 of the B.P.M.C.Act. The judgment and order of the learned trial court Judge is against the principles as laid down by the Division Bench in case of Vijay Owners' Association (supra). Therefore, this court is bound to interfere with the same.

22. Chapter XIX of the B.P.M.C.Act is regarding penalties to be imposed on any persons who violates the provisions and rules. Clause 6 Sub-clause (1) is prescribing penalty of Rs.1,000/-. It does not prescribe any sentence to be awarded. Therefore, I am of the opinion that while allowing the appeal of the appellant-original complainant, I am duty bound to award for sentence of fine of Rs.1,000/- on the respondent no.1.

23. Accordingly, this appeal is allowed. The respondent no. 1 is hereby directed to pay fine of Rs.1,000/- i/d order to undergo one month simple imprisonment by setting aside the judgment and order of the learned trial court, J.M.F.C. (Muni.) Surat. Yadi to the concerned court for necessary follow up and action.

(SHARAD D DAVE, J)

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